



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Memorandum

To: Federal Aviation Administration, Federal Highway Administration, and Federal Transit Administration Recipients and Sponsors Implementing the Disadvantaged Business Enterprise (DBE) Program

From: Charles E. James, Sr.
Director, Departmental Office of Civil Rights

Re: Definition of Native American Owned DBEs

Date: August 26, 2019

I am writing to remind you of the 2014 revision to the DBE program regulation 49 C.F.R. Part 26 (the “Regulation”) concerning Native American owners of DBEs and firms applying for certification.

FAA, FHWA, and FTA recipients must ensure that only firms meeting all eligibility standards of the Regulation (including ownership, management, and control by one or more socially and economically disadvantaged individuals) are certified as DBEs. Section 26.67(a)(1) requires that recipients rebuttably presume that members of groups specified in that provision are socially and economically disadvantaged; this includes Native Americans. The term “Native Americans” was revised in the Department’s 2014 final rule to make it consistent with the Small Business Administration’s definition of the term. See 79 Fed. Reg. 59566, 59579 (Oct. 2, 2014). This revision clarified that an individual must be an enrolled member of a Federally or State recognized Indian tribe to receive the presumption of social disadvantage as a Native American. (Under Section 26.5, the term “Native Americans” also includes Alaska Natives, or Native Hawaiians.)

It has come to the Department’s attention that some certified DBE firms may have relied on the owner(s)’ membership in Indian tribes that are not federally or State recognized. Some of these firms may have been certified before the 2014 revision to the definition of “Native Americans,” when enrolled membership in federally or State recognized tribes was not expressly required, and some may have been certified since that time without recognition of the revised definition. It is important to the integrity of the DBE Program that only firms meeting all eligibility standards of the Regulation, including social disadvantage, are allowed to participate in the program.

For firms that have already been certified in a State based on the claimed Native American membership status of the owner(s), the Regulation at Section 26.83(h)(2) permits a Unified Certification Program (UCP) to conduct a certification review of a certified DBE firm, if appropriate in light of changed circumstances. The regulatory definition change to the term “Native Americans” is a changed circumstance that may

affect the disadvantaged status of certain DBE firms that relied on the owner(s)' claim of membership in an Indian tribe if the tribe is not federally or State recognized. The Regulation at Section 26.109(c) requires DBE firms to cooperate fully and promptly with recipient certification and compliance reviews. In the case of Native Americans, a UCP review can request the owner to provide Indian tribal roll cards, a letter from a community group, education institution, religious leader, or government agency corroborating that the individual is a member of the claimed group.

Please review your State UCP Directory to determine which DBEs are owned and controlled by Native Americans and verify whether the owner(s) relied upon for disadvantaged status is an enrolled member of a federally or State recognized Indian tribe (this request does not affect owners who claim status as an Alaskan Native or Native Hawaiian). If they are not, you must initiate proceedings to remove the firm's DBE eligibility under the procedures at Section 26.87. If the DBE's certification is removed through the Section 26.87 process, the firm may reapply for certification based on an individual determination of social and economic disadvantage under Section 26.67(d).

The Regulation also requires recipients to take appropriate denial actions in the case of new applications for DBE certification. Please review your current in-state certification applications for applicants who claim the presumption of social and economic disadvantage based on their status as Native Americans. In submitting their Affidavit of Certification, applicants recognize that the certifying government entity may, by means it deems appropriate, determine the accuracy of the statements in the application, which may include verifying Native American status by requesting proof of enrolled status in a federally or State recognized Indian tribe. *See Affidavit of Certification, 49 C.F.R. Part 26, Appendix F.* If an applicant seeking certification as a Native American based on membership in an Indian tribe cannot prove enrolled status in a federally or State recognized Indian tribe, the UCP should deny the application. An applicant that is denied certification may reapply for certification, consistent with the recipient's DBE Program and the Regulation, seeking an individual determination of social and economic disadvantage. As always, should the UCP deny the initial application or decertify a firm under any basis, the applicant has the opportunity to appeal the decision to the Department under Section 26.89.

Going forward, to streamline the certification process for applicants claiming Native American status as members of an Indian tribe, recipients should seek to amend their DBE Program Plans, with the written approval of the concerned operating administration, by seeking to supplement the Uniform Certification Application, at Appendix F of the Regulation, to require Native American applicants, as applicable, to submit documentation proving they are enrolled members of a federally or State recognized Indian tribe. *See 49 C.F.R. §26.83(c)(2).*

If you receive an interstate certification application from a Native American-owned DBE whose majority owner(s) is not a member of a federally recognized tribe but is enrolled in a State recognized Indian tribe, you must verify whether your State recognizes the tribe. It is possible that your State does not recognize an Indian tribe even though the firm's home State does recognize it. In that instance, you must notify the firm that there is "good cause" under Section 26.85(d)(2) to determine that the

firm's home state certification of the firm should not apply in your State and follow the requirements of Section 26.85(d)(4).

For additional information regarding evidence of group membership, please see the 2003 and 2014 final rules, available on our website at:

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-laws-policy-and-guidance>

Thank you for your continued cooperation.